

2021 CAPITAL LITIGATION CONFERENCE: DELVING INTO DEFENSE EXPERTS

February 25 - 26, 2021



EXPERTS AND DIFFERENT TOPICS

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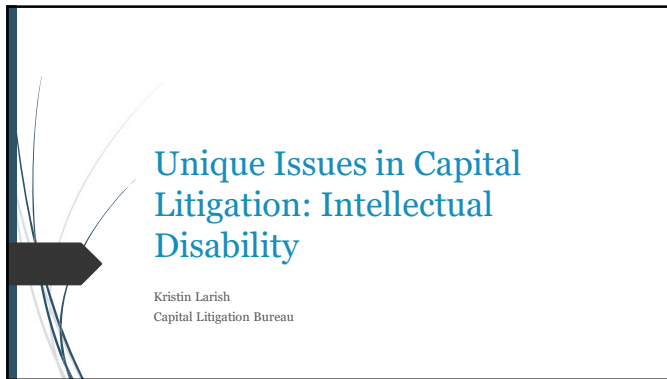
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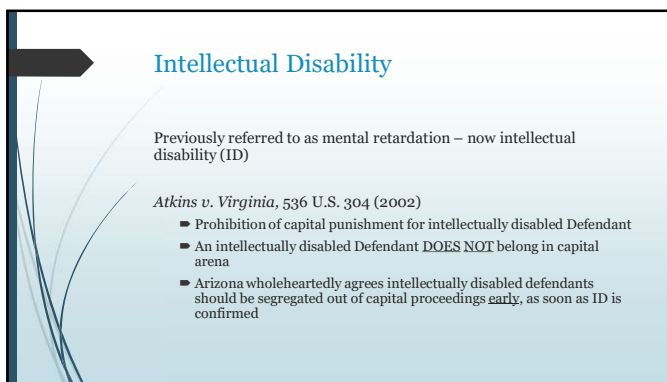
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Unique Issues in Capital Litigation: Intellectual Disability

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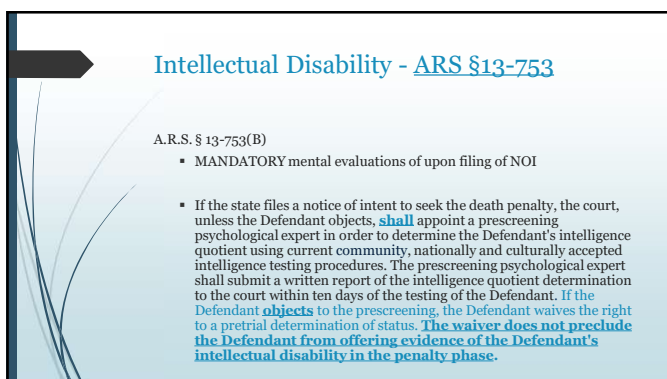
Intellectual Disability

Previously referred to as mental retardation – now intellectual disability (ID)

Atkins v. Virginia, 536 U.S. 304 (2002)

- Prohibition of capital punishment for intellectually disabled Defendant
- An intellectually disabled Defendant **DOES NOT** belong in capital arena
- Arizona wholeheartedly agrees intellectually disabled defendants should be segregated out of capital proceedings early, as soon as ID is confirmed

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Intellectual Disability - ARS §13-753

A.R.S. § 13-753(B)

- MANDATORY mental evaluations of upon filing of NOI
- If the state files a notice of intent to seek the death penalty, the court, unless the Defendant objects, shall appoint a prescreening psychological expert in order to determine the Defendant's intelligence quotient using current community, nationally and culturally accepted intelligence testing procedures. The prescreening psychological expert shall submit a written report of the intelligence quotient determination to the court within ten days of the testing of the Defendant. If the Defendant objects to the prescreening, the Defendant waives the right to a pretrial determination of status. The waiver does not preclude the Defendant from offering evidence of the Defendant's intellectual disability in the penalty phase.

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Intellectual Disability - ARS §13-753

State v. Gates (Altamirano) 243 Ariz. 451 (Feb. 2018)

- Defendant "cannot void his waiver"
- NO CONDITIONAL OBJECTION
- If an objection is lodged, Defendant waives right to pretrial ID evaluation
- Waiver does not deprive court of discretionary authority to order a pretrial ID evaluation if Defendant later requests or consents
 - * Court's authority to order [pretrial ID] examination is not unlimited
 - * Must consider whether ordering evaluation prejudices State or Victims
 - * Require court to continue trial date?
 - * Defendant always retains right to present ID issue to jury in Penalty Phase

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Intellectual Disability

ARS §13-753 prescreen (first step): "FSIQ"

- Higher than 75, report sealed, only available to Defendant [13-753(C)]
- 75 or less, additional experts (appointed, retained) [13-753(D)]
- All scores above 70, NOI shall not be dismissed [13-753(F)]
- Pretrial Hearing to determine ID [13-753(G)]

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Intellectual Disability Hearing

If proceeding to a Hearing;

- Defense burden to prove ID by clear & convincing evidence [13-753(G)]
- Determination of IQ 65 or lower establishes a rebuttable presumption Defendant is ID

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Intellectual Disability Hearing

A.R.S. §13-753(K) – definitions & requirements

■ (K)(3) “Intellectual Disability”

A condition based on mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of 18

■ “Three-Prong Test”

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Intellectual Disability Hearing

In other words:

1. Full scale IQ of 70 or lower
 2. Significant impairment in Adaptive Behavior
 3. Onset before 18
- = *Atkins* Evidentiary Hearing

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Intellectual Disability Hearing

A.R.S. §13-753(K)(2) – Expert in ID

- 5 years experience in testing, evaluation & diagnosis of ID
- Be prepared to challenge & attack experience (Evidentiary Hearing?)
- Know the testing used by experts
- Know the scoring used by experts

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Intellectual Disability Hearing

(K)(5) "Significantly subaverage general intellectual functioning"

- A full scale IQ of 70 or lower. The court in determining the IQ shall take into account the margin of error for the test administered.
- + or - 5 points must be added to the IQ score
- *Hall v. Florida*, 572 U.S. 701 (2014)
- Please familiarize yourself with IQ Test(s)/Scoring/Normative Data – this is critical

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Intellectual Disability Hearing

Altamirano example

- Mexican National
- In Arizona since 14-15yrs old; 29 @ time of crime
- Spanish-speaker, predominately Spanish household
- Bilingual
- IQ testing in Spanish &/or English? Both!
- "Bate-and-Switch" by Defense Expert

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Intellectual Disability Hearing



Spanish/Foreign Language IQ testing

- Valid?
- Most recent version of test? *Ex.* Mexican WAIS-III
- CHECK SCORING! What norming sample/data used?
- BE CAREFUL: US norms used for scoring a Spanish IQ test, normed for Spanish speakers:
 - Resulted in necessarily lower (dramatically lower) IQ score(s)
 - Had proper Spanish-speaking norms been used to score Spanish-speaking IQ test, *Altamirano would not have had IQ score of 70 or below, therefore First Prong would not have been found*

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Intellectual Disability Hearing

(K)(5) – Adaptive Behavior

- “Adaptive behavior” means the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group

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Adaptive Behavior – Adaptive Functioning

Three Domains (DSM-5, p. 37-38):

- **Conceptual** - memory, language, reading, writing, math, practical knowledge, problem solving, and use of judgment in practical situations
- **Social** - awareness of interpersonal situations, e.g., thoughts, feelings, empathy, communication skills, friendships, application of social judgment
- **Practical** - ability to function independently in areas of personal care, work responsibilities, money management, recreation, self-regulation of behavior, school and work task organization

Adaptive Function Testing?

- ABAS
- Vineland

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Adaptive Behavior – Adaptive Functioning

- Marital status, relationships, children = *role*
- Work history = *type of work*
- Educational records = *reasons therefore*
- Driver's license = *what lengths did Defendant go to in order to get license*
- Military = *position, commendations, discharge*
- Personal property = *apartment, house, car, bank account(s), computer, video games*
- Medical records = *SSI-disability records, IRS, medications, appointments*

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Adaptive Behavior – Adaptive Functioning

- Specialized training, memberships
- Utility/rent payment & records
- Mail, subscriptions
- Benefits, bank records, finances, ATM, debit card
- Transportation & travel (daily)
- Appointments (type, to & from)
- Medication (pick up, daily dosing)
- Food preparation

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Adaptive Behavior – Adaptive Functioning

- Criminality – be cautious:
 - Drug seller? Buyer? Burglary? Tools? TOMOT? Premeditation? Level of sophistication?
 - Prior convictions
 - Plea agreements, P.S.R.'s, letters of support
 - CHS Records!!!
- Interactions with Authorities
- Interactions with Others
- Self care & care of others = *caretaker?*
 - AND reasons it may be lacking

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Intellectual Disability – Age of Onset

ONSET BEFORE THE AGE OF 18

- Where raised?
- Socio-cultural background
- School records available?
- Medical & Psychological records
- Collateral interviews = *family, teachers, friends, co-workers, co-defendants, victims, jail/prison staff*

† Remember – Defendant put this in issue, State entitled to these records; Motion to Compel (Specific) Discovery

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Intellectual Disability – Age of Onset

Challenges:

- Age of Defendant – predate testing, records destroyed?
- Location of schooling – rural v. metropolitan
- Testing performed? Purpose of test? Records retained?
- Foreign National
- “Prejudice” surrounding ID – “Cloak of competence”

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Intellectual Disability – Age of Onset

- Talk to school administrator/educator/representative
- Review report cards, student records, testing?
- School's catalogue, protocols, regulations, relevant dates (compared to now?)
- Learn what records mean
 - Codes?
 - “Special” classes – what/why?
 - Distinguish - truancy, behavior problems?

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Intellectual Disability Hearing

- **Current** medical diagnostic standards must be applied. Mild ID is ID and death shall not be imposed
- State standards cannot ignore current medical standards defining mental disability/ID
- Cannot rely on nonclinical factors (“*Briseno* Factors”)
- *Moore v. Texas (Moore I)*, 137 S.Ct. 1039 (2017)
- *Moore v. Texas (Moore II)*, 139 S.Ct. 666 (2019)
- Know the current DSM and AAIDD clinical definitions
- Ask your Expert to assist you with real-life application of these clinical & medical terms

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Intellectual Disability Hearing

State ex rel Montgomery v. Kemp (Altamirano) 249 Ariz. 320 (Aug. 2020)

- ASC clarified that *Moore v. Texas*, 137 S. Ct. 1039 (2017) (“*Moore I*”), and *Moore v. Texas*, 139 S. Ct. 666 (2019) (“*Moore II*”) did not change or invalidate Arizona’s statutory scheme for evaluating intellectual disability. *Kemp/Altamirano*, 249 Ariz. at 321, ¶ 1.
- Trial courts must “(1) conduct an overall assessment to determine if the defendant has a deficit in any life-skill category; and (2) if a deficit exists, determine whether it affects the defendant’s ability to meet ‘**the standards of personal independence and social responsibility expected of defendant’s age and cultural group.**’” *Id.*

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Intellectual Disability Hearing

Determining adaptive behavior in Arizona under *State v. Kemp*:

- “[A] court should first conduct an **overall assessment by holistically considering the strengths and weaknesses in each of the life-skill categories** (conceptual, social, and practical), as identified by the medical community, to determine if there is a deficit in any of these areas.” *Id.* at ¶ 20.
- Cannot “offset weaknesses in one category with unrelated strengths from another category.” *Id.* (citing *Moore I*, 137 S. Ct. at 1050 n.8).
- If no deficit is identified, the inquiry ends. *Id.* at ¶ 21.

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Intellectual Disability Hearing

Determining adaptive behavior in Arizona under *State v. Kemp*:

- If a deficit is found -- court should then “determine whether that deficit, **in light of the individual’s overall assessment of the life-skill categories, actually affects the defendant’s ability to function with the ‘personal independence and social responsibility expected of the defendant’s age and cultural group.’**” *Id.* (quoting A.R.S. § 13-753(K)(1)).
- “Only then can a court find a defendant has met the adaptive behavior prong necessary for proving an intellectual disability.” *Id.*

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Intellectual Disability Hearing

SUGGESTIONS

- What evidence is the defense *not* introducing?
 - Example
- Adaptive functioning both in childhood AND as an adult – don't allow the defense or court to conflate the two inquiries (overall assessment of personal independence & social responsibility expected of defendant's age & cultural group)
 - Example
- * Important. (Repeatedly) make your **OFFER OF PROOF** for your evidence the court does not think relevant & precludes
 - Example

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Intellectual Disability Hearing

CROSS-EXAM TIPS

- Proper credentials & forensic experience
- Clinical v. forensic experience
- Self-report tests - believe what Defendant says
- Accurate Historian
- Proper testing conditions & administration
- Appropriate main-stream tests
- Accurate scoring
 - * GET RAW DATA!!
 - * Proper norms applied
 - * Forensic opinion based on data

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Contact Info & Stay Tuned!!

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